STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for Permits pursuant to Articles 17 and 24 of the Environmental Conservation Law (ECL), Section 401 of the federal Clean Water Act (CWA), and Parts 663 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by	Supplemental Rulings on Issues for Adjudication
Town/Village of Harrison, New York Applicant.	DEC Application No.: 3-5528-00104/00001
(Project Home Run)	July 15, 2011

On May 29, 2009, I ruled on proposed issues for adjudication and requests for party status concerning the captioned permit application. The May 29, 2009 issues ruling is incorporated by reference into this supplemental ruling, subject to my comments below.

Proceedings

In addition to ruling on proposed issues for adjudication and requests for party status, the May 29, 2009 issues ruling (at 54) requested additional information concerning the following topics: (1) the required environmental review for the project; (2) a letter of map revision (LOMR) filed by the Town/Village of Harrison (Harrison) with the federal emergency management agency (FEMA); and (3) Department staff's request for information related to compensatory storage.

I. SEQRA Review

The May 29, 2009 issues ruling (at 42-46) identified a potential procedural defect associated with the environmental review of the project as required by Environmental Conservation Law (ECL) article 8 (State Environmental Quality Review Act [SEQRA]), and implementing regulations at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 617 (State Environmental Quality Review [SEQR]). Upon review of documentation provided by the parties, I issued a ruling on SEQRA compliance dated August 21, 2009. The August 21, 2009 SEQRA ruling is incorporated by reference into this supplemental ruling.

For the reasons outlined in the August 21, 2009 SEQRA ruling, I concluded (at 7) that Harrison did not conduct a coordinated review consistent with the requirements outlined at 6 NYCRR 617.6(b)(3). As a result, I remanded the matter to Department staff to issue a determination of significance consistent with the requirements outlined in 6 NYCRR Part 617. With an email dated March 8, 2011, Department staff provided the parties and me with, among other things, a copy of a Negative Declaration concerning the captioned matter dated March 8, 2011.

II. Letter of Map Revision

As discussed in the May 29, 2009 issues ruling (at 35-41), FEMA modified the flood insurance rate map in the vicinity of the project site in September 2007. With a cover letter dated July 1, 2009, Supervisor/Mayor Walsh enclosed a LOMR from FEMA dated June 24, 2009. Based on the June 24, 2009 LOMR from FEMA, Harrison revised the proposal, as discussed further below.

III. Permit Application Updates

With cover letters dated December 28, 2009, May 27, 2010, and September 22, 2010, Harrison provided the parties and me with additional information and revised/amended plans concerning Project Home Run. With the December 28, 2009 submission, then Commissioner Robert Wasp explained, in his cover letter of the same date, that the project has been scaled down. According to Commissioner Wasp, the project includes one baseball field, one multi-purpose field/grass area, a gazebo and walking path, and associated parking. Commissioner Wasp explained further that the area originally proposed as “Upland Wetland Buffer” would be modified by lowering the grade and by planting wetland vegetation in order to provide additional vegetated wetland area and flood water storage.

With the December 28, 2009 submission, Harrison included, among others, drawings labeled B-1 and B-2. B-1 depicts the original (2007) wetlands disturbance, and B-2 depicts the proposed (2009) wetlands disturbance and mitigation. Drawing C-1 depicts the revised floodway limit effective December 2007. Based on C-1, all the features related to the proposed project would be located landward of the floodway limit.

Subsequently, Harrison responded to additional inquiries from Department staff with submissions filed under cover of letters dated May 27, 2010 and September 22, 2010. The intervening parties had the opportunity to review the information, and provide Department staff with comments about Harrison's submissions.

After reviewing the information filed by Harrison and the intervening parties, Department staff issued a revised draft permit under cover of an email dated March 8, 2011. The March 8, 2011 revised draft permit includes an updated project description consistent with the modification outlined in Harrison's December 28, 2009 submission. In part, the project would entail the filling and grading of about 0.162 acres of Wetland J-3, and 2.00 acres of the regulated adjacent area, and the planting of 1.07 acres of the site with native wetland vegetation.

IV. Additional Filings from the Parties

In a memorandum dated March 17, 2011, I asked Harrison whether it would accept the terms and conditions of the revised draft permit dated March 8, 2011. In an email dated April 1, 2011, Mr. Allegretti, Harrison's legal counsel, stated that Harrison accepted the terms and conditions of the March 8, 2011 draft permit.

In a memorandum dated April 4, 2011, I outlined a schedule for the intervenors to advise whether they objected to the terms and conditions of the revised draft permit dated March 8, 2011. I received timely responses from all three intervening parties.

Ms. Wilson, on behalf of the City of Rye (Rye), filed an email dated April 22, 2011 and a letter of the same date. According to Rye, the March 8, 2011 draft permit does not resolve its proposed issues for adjudication. Rye proposed alternative language, however, for draft permit conditions nos. 9 and 11. In addition, Rye recommended that the March 8, 2011 draft permit expressly limit the amount of fill that could be placed on the site. Rye's proposed permit conditions are discussed further below.

Attached to an email dated April 22, 2011, Mr. LaDore filed a letter of the same date. Mr. LaDore objects to the March 8, 2011 revised draft permit. Mr. Schaper filed an email dated April 22, 2011, in which he states that the terms and conditions of the March 8, 2011 revised draft permit are unacceptable.

The intervening parties also provided some preliminary comments about Department staff's March 8, 2011 negative declaration. These comments are addressed below.

In a briefing schedule dated May 6, 2011, I provided the intervening parties with the opportunity to comment further about the adequacy of Department staff's March 8, 2011 negative declaration. The schedule set June 8, 2011 as the deadline for any additional argument. I received: (1) an email dated June 8, 2011 from Mr. Schaper; (2) an email dated June 8, 2011 and attached letter of the same date from Mr. LaDore; and (3) an email dated June 8, 2011 from Ms. Wilson with attached letter of the same date.

The May 6, 2011 briefing schedule provided Department staff and Harrison with an opportunity to respond by July 1, 2011. I received a letter dated July 1, 2011 from Ms. Krebs, on behalf of Department staff, with two enclosures. The first is a copy of the full Environmental Assessment Form (EAF) prepared by Michael J. Amodeo, P.E., Town/Village Engineer, dated May 27, 2010. Harrison completed Part 1 of the May 27, 2010 EAF. The second enclosure is a copy of the full EAF prepared by Daniel T. Whitehead, Deputy Regional Permit Administrator for DEC Region 3, dated March 8, 2011. Department staff completed Parts 2 and 3 of the March 8, 2011 EAF. I did not receive any response from Harrison.

Discussion and Rulings

I. Department staff's SEQRA Review

The August 21, 2009 SEQRA ruling identified a procedural defect concerning the required environmental review of the project. After remanding the matter to Department staff, the procedural defect has been cured. The intervening parties, however, object to the March 8, 2011 negative declaration, and assert that Department staff's review is insufficient.

A. City of Rye

In its April 22, 2011 letter, Rye renews "its request for adjudication of Issues I, II, and IV." Generally, these proposed issues relate to the environmental review required by SEQRA. According to Rye, its petition concerning proposed issue No. I outlines some of the significant project changes that occurred since Department staff issued the ROD, and identifies concerns about the environmental impacts associated with those changes. With respect to issue No. II, Rye contends that Harrison has not shown how the "no-net-loss standard" would be met. Concerning issue No. IV, Rye asserts that Harrison has not adequately considered mitigation or alternatives to its proposed project.

In its June 8, 2011 letter, Rye argues further that Department staff, as lead agency, did not properly evaluate the potential environmental impacts associated with the loss of flood storage capacity on the site and portions of Freshwater Wetland J-3. According to Rye, Department staff did not consider Rye's extensive comments that include reports, memoranda and letters about the following topics. Rye argues that the March 8, 2011 negative declaration should be remanded for further review.

Rye contends that Department staff cannot rely on the revised LOMR and Harrison's redesign, which locates all features landward of the revised floodway boundary, to avoid the obligation to evaluate the potential loss of flood storage capacity and alternatives that could increase the flood storage capacity of the site. Rye states that its consultants requested the information that FEMA reviewed in order to understand the basis for FEMA's determination.

Rye explains that its consultant, FPM, undertook an analysis in August 2010 related to the site's existing storm storage volume and that the results of the August 2010 FPM analysis are different from those presented on the Leonard Jackson & Associates plans, which are referenced in the March 8, 2011 negative declaration. Rye observes there are two conflicting expert reports, and argues that, absent a resolution of the conflicting information, the requisite "hard look" did not take place.

Moreover, Rye disputes Department staff's conclusion that the project would not adversely impact Freshwater Wetland J-3, and argues there is no consideration of less intrusive alternatives. Rye notes that the man-made pond was a required element of the ROD for the remediation of the site. With respect to the redevelopment of the site, however, this pond would be filled in, and is not considered essential because it is not hydrologically connected to the wetland.

B. Messrs. LaDore and Schaper

As noted above, Mr. LaDore filed a letter dated April 22, 2011, and Mr. Schaper filed an email also dated April 22, 2011. In addition, Mr. LaDore filed a letter dated June 8, 2011, and Mr. Schaper filed an email also dated June 8, 2011.

In his April 22, 2011 and June 8, 2011 letters, Mr. LaDore contends that Department staff did not adequately determine the potential impacts of flooding. Mr. LaDore asserts that an environmental impact statement (EIS) is required pursuant to 6 NYCRR 617.7(a)(1 and 2) and federal guidelines and, with reference to 6 NYCRR 624.4(c)(6)(i), argues that I have authority to direct Department staff to prepare an EIS.

Mr. LaDore notes that Department staff did not conduct independent field studies or even visit the site of late, but has improperly relied on materials provided by Harrison. According to Mr. LaDore, the intervening parties have presented materials to refute the supplemental materials filed by Harrison.

With respect to the noise study, Mr. LaDore notes that it is limited to construction activities. Mr. LaDore argues that a noise analysis considering recreational sports activities should have been undertaken.

Messrs. LaDore and Schaper argue that the traffic study was inadequate, and that Department staff should not have relied upon it. In addition, Mr. Schaper argues further that Harrison should have undertaken a comprehensive seasonal traffic study that included a consideration of the proposed MTA development project located adjacent to the parking lots at the Harrison rail station.

In his June 8, 2011 letter, Mr. LaDore notes that Harrison continues to revise and modify the project. Mr. LaDore objects to these frequent modifications, and argues that it is difficult to evaluate the project because it keeps changing.

In his June 8, 2011 email, Mr. Schaper asserts that Harrison's traffic analysis has no value because it does not consider the proposed MTA project. Mr. Shaper asserts further that Department staff has ignored the other information provided by Rye, which contradicts the results of the studies undertaken by Harrison's consultants. Mr. Schaper notes that since the completion of the remediation project, the site has settled unevenly and, therefore, cannot be used as an athletic field.

C. Department Staff

In its July 1, 2011 response, Department staff notes that Harrison, rather than the DEC, is the SEQRA lead agency. According to Department staff, the DEC is an involved agency for this unlisted action, and that the review has been uncoordinated. Given these circumstances, Department staff argues that my review is limited to whether the determination is irrational or otherwise affected by an error of law, and that my authority is limited to remanding the matter to Department staff for a redetermination (*see* 6 NYCRR 624.4[c][6][i][a]).

Department staff explains that Harrison completed Part 1 of a full EAF on May 27, 2010, and that Department staff completed Parts 2 and 3 of the full EAF on March 8, 2011. Based on the review of the completed EAF, Department staff determined that the project would not result in any large and important impacts. As a result, Department staff concluded the project would not have a significant impact on the environment and, therefore, issued the March 8, 2011 negative declaration.

Contrary to intervenors' assertions, Department staff asserts that it undertook the requisite hard look and has provided a reasoned elaboration for its determination. To support this assertion, Department staff states that it had requested additional information from Harrison concerning several topics. In addition, Department staff notes that intervenors provided comments about Harrison's submissions. Department staff states further that it reviewed and considered

intervenors' comments. As a result, Department staff observes that Harrison modified the project to address the parties' concerns.

With respect to the flood storage capacity of the site, Department staff explains that it has reviewed submissions prepared by Harrison's consultants, Leonard Jackson Associates, concerning fill placement and compliance with local and federal floodplain management regulations. Based on this review, Department staff has concluded there would be less than a one inch rise in water levels, which is within the acceptable limits implemented by FEMA.

Department staff notes further that based on the approved LOMR and Harrison's engineering plans, no fill would be placed in the floodway. Department staff states that it has no authority or jurisdiction to question the federal determination, and notes that the National Flood Insurance Program is a federal program administered at the local level. Department staff notes that Local Law Chapter 146 (Flood Damage Prevention) of the Town Code (enacted September 20, 2007) would apply to this proceeding. Although the Department of Environmental Conservation has no authority to enforce this law, Department staff notes that the March 8, 2011 revised draft permit would require Harrison to comply with this local law and to obtain all other necessary permits and approvals.

D. Ruling

As discussed in the May 29, 2009 issues ruling (at 2, 43) and the August 21, 2009 SEQRA ruling (at 3-4, 6), Harrison is the lead agency concerning the captioned matter, which is limited to the redevelopment of the site, and the Department is an involved agency. For the reasons stated in the August 21, 2009 SEQRA ruling, I determined that Harrison, as the lead agency, did not properly coordinate the SEQRA review of the captioned matter (at 7). Therefore, I directed Department staff to undertake its own review (August 21, 2009 SEQRA ruling at 7). For unlisted actions, such as this one, the regulations allow for an uncoordinated review (*see* 6 NYCRR 617.6[b][4]), unless an involved agency determines that the action may have a significant adverse impact on the environment (*see* 6 NYCRR 617.6[b][4][ii]). Under such circumstances, a coordinated review must be undertaken (*see id*.).

Given the uncoordinated review of this unlisted action, Department staff correctly argues that the scope of my review of the March 8, 2011 negative declaration is limited to whether Department staff's determination is irrational or otherwise affected by an error of law and, if such a defect has occurred, my authority is limited to remanding the matter to Department staff for a redetermination (*see* 6 NYCRR 624.4[c][6][i][a]). Therefore, the first question is whether Department staff's determination is irrational or otherwise affected by an error of law.

I conclude that Department Staff's March 8, 2011 negative declaration concerning the captioned matter is rational and not otherwise affected by an error of law. In making this determination, I have considered the comments provided by the intervening parties. In the March 8, 2011 negative declaration and its July 1, 2011 response, Department staff took the required hard look at potential environmental impacts and provided a reasoned elaboration for the negative declaration. Consequently, the environmental review of the project, required by ECL Article 8 and implementing regulations at 6 NYCRR Part 617, has been completed.

II. Draft Permit Conditions

I noted in my March 17, 2011 memorandum that DEC Organization and Delegation Memorandum (O&D) No. 85-06, dated February 11, 1985, directs Department staff to prepare draft permit conditions for all projects that are the subject of a permit hearing. The purpose of the draft permit is to narrow the issues to be adjudicated. After Department staff circulated the revised draft permit dated March 8, 2011 to the parties and me, I provided the parties with the opportunity to comment about the March 8, 2011 revised draft permit to determine whether any proposed issues for adjudication had been resolved.

As noted above, Harrison accepted the terms and conditions of the March 8, 2011 revised draft permit. Consequently, there are no issues for adjudication between Department staff and Harrison about any substantial terms or conditions (*see* 6 NYCRR 624.4[c][1][i]).

Intervening parties, however, object to the terms and conditions of the March 8, 2011 revised draft permit. Consequently, they have the burden of persuasion to demonstrate that their proposed issues are substantive and significant, in the absence of any disputes between Harrison and Department staff (*see* 6 NYCRR 624.4[c][4]). The intervening parties' proposed issues for adjudication are discussed in the next section of this supplemental ruling.

Nevertheless, in its April 22, 2011 letter, Rye proposed modifications to three conditions proposed in the March 8, 2011 revised draft permit. As currently drafted, Natural Resource Conditions Nos. 9 and 11 (pp 3 of 7, and 4 of 7) would require Harrison to monitor the proposed revegetated areas of the wetland and adjacent area (No. 9), and the final elevations of the graded areas on the site (No. 11). The revised draft permit would require Harrison to prepare and file reports with the Department staff annually. Rye, as a neighboring municipality, requests that these conditions be modified to require Harrison to provide Rye with a copy of these annual reports.

In its July 1, 2011 letter, Department staff acknowledges that Rye's request is reasonable. Department staff reports that it conferred with Harrison about the proposed modification, and that Harrison agreed to provide Rye with copies of the reports required by Natural Resource Conditions Nos. 9 and 11. Accordingly, Natural Resource Conditions Nos. 9 and 11 of the March 8, 2011 revised draft permit are revised.

In its April 22, 2011 letter, Rye also seeks a condition to expressly limit the amount of fill that could be brought to the site. Rye acknowledges that approximate fill limits are referenced in the March 8, 2011 revised draft permit. If Harrison needs to bring additional fill to the site in excess of permit limits, Rye argues that Department staff should be required to review the additional amount of fill and determine whether the proposal "is viable or if additional action should be taken."

Department staff responds to Rye's request in its July 1, 2001 letter. Department staff explains that it is not in a position to estimate the exact amount of fill required for the project and, therefore, did not propose a more precise limit in the March 8, 2011 revised draft permit. According to Department staff, the flood analysis and plans, proposed Natural Resource

Condition No. 11, and Harrison's local law would address concerns related to the amount of fill that could be brought to the site.

III. Issues for Adjudication

In the May 29, 2009 issues ruling, I joined for adjudication the issues proposed in Rye's October 16, 2008 Amended/Supplemented Petition identified as issues Nos. II, V (including V-A and V-B), and VI. I also joined Mr. Schaper's proposed issues related to potential adverse impacts to the freshwater wetlands, which essentially mirror those proposed by Rye. (*See* May 29, 2009 Ruling at 50-51.)

With respect to the SEQRA-related issues proposed in Rye's October 16, 2009 Amended/Supplemented Petition as issues Nos. I, III, and IV, I concluded that the regulations (*see* 6 NYCRR 624.4[c][6][ii][a]) precluded any consideration of these proposed issues in this proceeding (*see* May 29, 2009 Ruling at 43).

I declined to join the issues proposed in Rye's October 16, 2008 Amended/Supplemented Petition identified as issues Nos. VII and VIII concerning federal compliance. Messrs. LaDore and Schaper had proposed similar issues, and I declined to join them as well. (*See* May 29, 2009 Ruling at 48.)

I granted the petitions for party status filed by Rye and Mr. Schaper. I granted Mr. LaDore's petition for amicus status. (*See* May 29, 2009 Ruling at 53-54.)

In its July 1, 2011 response, Department staff argues that the project, as revised subsequent to the May 29, 2009 issues ruling, would comply with the permit issuance criteria outlined at 6 NYCRR 663.5 for a freshwater wetlands permit as conditioned by the March 8, 2011 revised draft permit.

In the May 29, 2009 issues ruling (at 51), I determined that the scope of the issue related to the public health and welfare weighing standard (*see* 6 NYCRR 663.5[e][2]) would include a consideration of whether:

> Project Home Run would adversely impact the compensatory storage capacity of that portion of the

floodway which would be filled as part of Project Home Run, and which is located within either Freshwater Wetland J-3 or its regulated adjacent area.

Based on the June 24, 2009 LOMR from FEMA, and the modification to the project outlined in the December 28, 2009 submission, all features of the project, including the placement of any fill in Wetland J-3 and the adjacent area, would be located landward of the floodway limit. Given these circumstances, the scope of the issue concerning the public health and welfare weighing standard, therefore, will not include any consideration of potential adverse impacts to the compensatory storage capacity.

Except as discussed in the preceding paragraph, my rulings concerning the issues joined for adjudication and my rationale for joining some and excluding others, as outlined in the May 29, 2009 issues ruling (at 41-54), remain unchanged. The experts identified by the intervening parties have presented offers of proof related to the issuance standards for a freshwater wetlands permit that conflict with the application materials.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling (*see* 6 NYCRR 624.6[e][1]).

For the reasons outlined in the May 29, 2001 issues ruling, appeals from that ruling have been held in abeyance pending the submission of additional information and, subsequently, compliance by Department staff with the requirements outlined in ECL Article 8 and implementing regulations at 6 NYCRR Part 617.

The parties may now exercise their right to file appeals from the May 29, 2009 issues ruling and this supplemental issues ruling. Appeals must be received no later than 4:00 p.m. on August 15, 2011. Replies are authorized, and must be received no later than 4:00 p.m. on September 9, 2011.

The original and three copies of each appeal and reply thereto must be filed with Commissioner Joe Martens (attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. The copies received will be forwarded to Chief Administrative Law Judge James T. McClymonds and me. In addition, one copy of each submittal must be sent to all others on the service list (revised 5/7/2010) at the same time it is sent to the Commissioner. Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted.

I note that the August 21, 2009 SEQRA ruling (at 8) provided a schedule to appeal from that ruling, and stated further that a party's failure to appeal from the SEQRA ruling as prescribed would constitute a waiver of the right to appeal. No party filed any appeal. Therefore, the parties have waived the right to appeal from the August 21, 2009 SEQRA ruling.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
July 15, 2011

To: Service List
(revised 5/17/2010)